

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KENNETH E. FINK,
Petitioner,

v.

THOMAS J. CARROLL, Warden,
Delaware Correctional Center
and **CARL C. DANBERG,** Attorney
General of the State of Delaware,
Respondents.

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: Civil Action No.
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**PETITION FOR WRIT OF HABEAS CORPUS
UNDER 28 U.S.C. §2254**

1. Name and location of court which entered the judgment of conviction under attack:
Superior Court of the State of Delaware (New Castle County), 500 N. King Street, Wilmington, DE 19801.

2. Date of judgment of conviction: (1) conviction by jury - March 8, 2002; (2) sentencing date - May 23, 2002.

3. Length of Sentence: Petitioner was sentenced to 98 years in jail, suspended after serving 8 years, for 35 years probation. On March 24, 2004, the Court reduced the jail time from 8 years to 6 years.

4. Nature of offense involved: (1) 15 counts of Unlawfully Dealing in Child Pornography (11 *Del.C.* §1109(4)); (2) 15 counts of Possession of Child Pornography (11 *Del.C.* §1111).

5. What was your plea? - Not Guilty

6. If you pleaded not guilty, what kind of trial did you have? - Jury trial

7. Did you testify at the trial? - No

8. Did you appeal from the judgment of conviction? - Yes

9. If you did appeal, answer the following:

(A) Name of court - Supreme Court of Delaware

(b) Result - convictions and sentence were affirmed

(c) Date of result and citation - March 20, 2003; *Fink v. State*, 817 A.2d 781 (Del. 2003)

(D) Grounds raised:

(1) Whether the search warrant which authorized a search of the defendant's residence violated the 4th Amendment to the United States Constitution and whether the evidence seized as a fruit of that warrant and succeeding search warrants should have been suppressed at trial.

(2) Whether the sentence of 8 years in jail was excessive.

(3) Whether the defendant's convictions on 30 separate counts amounted to multiple prosecutions for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

(4) Whether the trial court's instruction concerning the elements of the offenses charged was a correct statement of the law.

(5) Whether the statutes under which the defendant was convicted were "overbroad" in violation of the First Amendment to the United States Constitution.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following: Not applicable.

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal: Not applicable.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes.

11. If your answer to 10 was "yes," give the following information:

(A) (1) Name of Court - Delaware Superior Court (New Castle County)

(2) Nature of proceeding - Petition for post-conviction relief under Superior Court Criminal Rule 61.

(3) Grounds raised:

(1) Whether the Defendant's appellate counsel was "ineffective" under *Strickland v. Washington*, 466 U.S. 668 (1984) in the defendant's direct appeal in failing to appeal the trial court's ruling concerning the validity of the search of the defendant's computers that were located at the defendant's residence and whether, if the above ruling had been appealed, there is a reasonable probability that the outcome of the appeal would have been different.

(4) Did you receive an evidentiary hearing on your petition, application or motion? No.

(5) Result - The Rule 61 Motion was denied. *State v. Fink*, decision dated October 28, 2005 (unreported)

(b) As to any second petition.... Not applicable

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion? Yes.

(d) If you did not appeal..... Not applicable

12. Grounds for Habeas Corpus Relief:

(1) Whether the search warrant which authorized a search of the defendant's residence violated the 4th Amendment to the United States Constitution and whether the evidence seized as a fruit of that warrant and succeeding search warrants should have been suppressed at trial.

(2) Whether the defendant's convictions on 30 separate counts amounted to multiple prosecutions for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

(3) Whether the statutes under which the defendant was convicted were "overbroad" in violation of the First Amendment to the United States Constitution.

(4) Whether the Defendant's appellate counsel was "ineffective" under *Strickland v. Washington*, 466 U.S. 668 (1984) in the defendant's direct appeal in failing to appeal the trial court's ruling concerning the validity of the search of the defendant's computers that were located at the defendant's residence and whether, if the above ruling had been appealed, there is a reasonable probability that the outcome of the appeal would have been different.

13. If any of the grounds listed in 12 were not previously presented in any court, state or federal, state briefly what grounds were not so presented and give your reasons for not presenting them. Not applicable.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment now under attack? No.

15. Give the names and addresses of each attorney who represented you at each stage of the judgment attacked herein:

(1) the following attorneys represented the petitioner during all or part of the period from the time of his arrest through conviction and sentence in the trial court.

Joe A. Hurley, Esquire
1215 King Street
Wilmington, DE 19801

Edmund D. Lyons, Jr., Esquire
1526 Gilpin Avenue
Wilmington, DE 19806

(2) The following attorneys represented petitioner on direct appeal

Joe A. Hurley, Esquire
1215 King Street
Wilmington, DE 19801

(3) The following attorneys represented the petitioner in state court post-conviction proceedings and on appeal in post-conviction proceedings

Joseph M. Bernstein, Esquire
800 N. King Street - Suite 302
Wilmington, DE 19801

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? No.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? No.

WHEREFORE, petitioner prays that the Court grant petitioner all relief to which he may be entitled under this Petition

s/ Joseph M. Bernstein
JOSEPH M. BERNSTEIN (#780)
800 N. King Street - Suite 302
Wilmington, DE 19801
302-656-9850
Attorney for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 3/16/06 s/ Kenneth E. Fink
Kenneth E. Fink

The JS-44 civil cover sheet and this information concerning the filing and service of proceedings in this court are required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS**KENNETH E. FINK****DEFENDANTS****THOMAS J. CARROLL, Warden, Delaware
Correctional Center, and CARL C.
DANBERG, Attorney General of the
State of Delaware****(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF**
(EXCEPT IN U.S. PLAINTIFF CASES)**New Castle****COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT**
(IN U.S. PLAINTIFF CASES ONLY)**NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
TRACT OF LAND INVOLVED****(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)****Joseph M. Bernstein
800 N. King Street - Suite 302
Wilmington, DE 19801
302-656-9850****ATTORNEYS (IF KNOWN)****Loren C. Meyers
Department of Justice
820 N. French St.
Wilmington, de 19801****II. BASIS OF JURISDICTION**

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY:

Petition for Habeas Corpus by a state prisoner under**28 U.S.C. §2254****V. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)**

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Motor Acc. <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veterans's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Assault <input type="checkbox"/> 315 Asbestos Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Automobile Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Theft or Larceny <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 154 <input type="checkbox"/> 423 Writ/Remed 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 620 Copyright <input type="checkbox"/> 630 Patent <input type="checkbox"/> 640 Trademark SOCIAL SECURITY <input type="checkbox"/> 681 SSA (1385f) <input type="checkbox"/> 682 Black Lung (823) <input type="checkbox"/> 683 DIWC/DWV (405(g)) <input type="checkbox"/> 684 DIWC (201) <input type="checkbox"/> 685 ASR (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 670 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 671 IRS - Third Party 26 USC 7608	<input type="checkbox"/> 400 State Appointments <input type="checkbox"/> 410 Arbitration <input type="checkbox"/> 430 Bank and Banking <input type="checkbox"/> 450 Commerce/ICC Rules/etc. <input type="checkbox"/> 460 Deposition <input type="checkbox"/> 470 Recreational Inland and Coastal Organizations <input type="checkbox"/> 610 Selective Service <input type="checkbox"/> 650 Securities/Commodities/Exchange <input type="checkbox"/> 675 Customer Challenge 12 USC 3410 <input type="checkbox"/> 691 Agricultural Act <input type="checkbox"/> 692 Economic Stabilization Act <input type="checkbox"/> 693 Environmental Matters <input type="checkbox"/> 694 Energy Allocation Act <input type="checkbox"/> 695 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statute <input type="checkbox"/> 990 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Eminent Domain <input type="checkbox"/> 230 Rent Liabilities & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Habeas Corpus <input checked="" type="checkbox"/> 534 Habeas Corpus <input type="checkbox"/> 535 Habeas Corpus <input type="checkbox"/> 540 Habeas Corpus <input type="checkbox"/> 545 Habeas Corpus <input type="checkbox"/> 550 Habeas Corpus <input type="checkbox"/> 555 Habeas Corpus <input type="checkbox"/> 560 Habeas Corpus <input type="checkbox"/> 565 Habeas Corpus <input type="checkbox"/> 570 Habeas Corpus <input type="checkbox"/> 575 Habeas Corpus <input type="checkbox"/> 580 Habeas Corpus <input type="checkbox"/> 585 Habeas Corpus <input type="checkbox"/> 590 Habeas Corpus <input type="checkbox"/> 595 Habeas Corpus <input type="checkbox"/> 600 Habeas Corpus <input type="checkbox"/> 605 Habeas Corpus <input type="checkbox"/> 610 Habeas Corpus <input type="checkbox"/> 615 Habeas Corpus <input type="checkbox"/> 620 Habeas Corpus <input type="checkbox"/> 625 Habeas Corpus <input type="checkbox"/> 630 Habeas Corpus <input type="checkbox"/> 635 Habeas Corpus <input type="checkbox"/> 640 Habeas Corpus <input type="checkbox"/> 645 Habeas Corpus <input type="checkbox"/> 650 Habeas Corpus <input type="checkbox"/> 655 Habeas Corpus <input type="checkbox"/> 660 Habeas Corpus <input type="checkbox"/> 665 Habeas Corpus <input type="checkbox"/> 670 Habeas Corpus <input type="checkbox"/> 675 Habeas Corpus <input type="checkbox"/> 680 Habeas Corpus <input type="checkbox"/> 685 Habeas Corpus <input type="checkbox"/> 690 Habeas Corpus <input type="checkbox"/> 695 Habeas Corpus <input type="checkbox"/> 700 Habeas Corpus <input type="checkbox"/> 705 Habeas Corpus <input type="checkbox"/> 710 Habeas Corpus <input type="checkbox"/> 715 Habeas Corpus <input type="checkbox"/> 720 Habeas Corpus <input type="checkbox"/> 725 Habeas Corpus <input type="checkbox"/> 730 Habeas Corpus <input type="checkbox"/> 735 Habeas Corpus <input type="checkbox"/> 740 Habeas Corpus <input type="checkbox"/> 745 Habeas Corpus <input type="checkbox"/> 750 Habeas Corpus <input type="checkbox"/> 755 Habeas Corpus <input type="checkbox"/> 760 Habeas Corpus <input type="checkbox"/> 765 Habeas Corpus <input type="checkbox"/> 770 Habeas Corpus <input type="checkbox"/> 775 Habeas Corpus <input type="checkbox"/> 780 Habeas Corpus <input type="checkbox"/> 785 Habeas Corpus <input type="checkbox"/> 790 Habeas Corpus <input type="checkbox"/> 795 Habeas Corpus <input type="checkbox"/> 800 Habeas Corpus <input type="checkbox"/> 805 Habeas Corpus <input type="checkbox"/> 810 Habeas Corpus <input type="checkbox"/> 815 Habeas Corpus <input type="checkbox"/> 820 Habeas Corpus <input type="checkbox"/> 825 Habeas Corpus <input type="checkbox"/> 830 Habeas Corpus <input type="checkbox"/> 835 Habeas Corpus <input type="checkbox"/> 840 Habeas Corpus <input type="checkbox"/> 845 Habeas Corpus <input type="checkbox"/> 850 Habeas Corpus <input type="checkbox"/> 855 Habeas Corpus <input type="checkbox"/> 860 Habeas Corpus <input type="checkbox"/> 865 Habeas Corpus <input type="checkbox"/> 870 Habeas Corpus <input type="checkbox"/> 875 Habeas Corpus <input type="checkbox"/> 880 Habeas Corpus <input type="checkbox"/> 885 Habeas Corpus <input type="checkbox"/> 890 Habeas Corpus <input type="checkbox"/> 895 Habeas Corpus <input type="checkbox"/> 900 Habeas Corpus <input type="checkbox"/> 905 Habeas Corpus <input type="checkbox"/> 910 Habeas Corpus <input type="checkbox"/> 915 Habeas Corpus <input type="checkbox"/> 920 Habeas Corpus <input type="checkbox"/> 925 Habeas Corpus <input type="checkbox"/> 930 Habeas Corpus <input type="checkbox"/> 935 Habeas Corpus <input type="checkbox"/> 940 Habeas Corpus <input type="checkbox"/> 945 Habeas Corpus <input type="checkbox"/> 950 Habeas Corpus <input type="checkbox"/> 955 Habeas Corpus <input type="checkbox"/> 960 Habeas Corpus <input type="checkbox"/> 965 Habeas Corpus <input type="checkbox"/> 970 Habeas Corpus <input type="checkbox"/> 975 Habeas Corpus <input type="checkbox"/> 980 Habeas Corpus <input type="checkbox"/> 985 Habeas Corpus <input type="checkbox"/> 990 Habeas Corpus		

VI. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify):
☐ 6 Multidistrict Litigation

Appeal to District
☐ 7 Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
☐ UNDER F.R.C.P. 23

DEMAND \$

Check YES only if demanded in complaint

JURY DEMAND: ☐ YES ☒ NO**VIII. RELATED CASE(S) IF ANY** (See instructions).

JUDGE _____ DOCKET NUMBER _____

DATE

March 16, 2006

SIGNATURE OF ATTORNEY OF RECORD

Joseph M. Bernstein